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Appearance of Impropriety, Recusal, and the Segars-Andrews Case

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**APPEARANCE OF IMPROPRIETY, RECUSAL,
AND THE SEGARS-ANDREWS CASE**

JOHN P. FREEMAN*

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You've got to know when to hold 'em, know when to fold 'em,
Know when to walk away, know when to run.¹

I. INTRODUCTION

This is not an easy age in which to serve as a state court judge. In state courts we find increasing pressure on judicial selection, in part driven by the “increase in politicized judicial campaigns.”² In turn, the trend toward the increasing politicization of judicial selection places increasing pressure on judicial independence.³ Consider, for example, the recent ousting of all three Iowa Supreme Court justices up for retention votes this past year.⁴ Their sole sin

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1. KENNY ROGERS, *The Gambler*, on *THE GAMBLER* (United Artists 1978).

2. Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 15, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22) [hereinafter *Conference of Chief Justices Brief*].

3. *See id.* at 4.

4. *See* A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

was that they had joined in their court's unanimous 7–0 decision legalizing same sex marriage,⁵ thereby bringing their retention elections within the cross-hairs of aggressive and well-heeled special interest groups.⁶

As the Iowa experience shows, a judge today need do nothing wrong in order to risk coming under a career-ending attack. Given this reality, actually *committing* a serious error—particularly one smacking of ethical impropriety—would be extremely ill-advised. Thankfully, many forms of ethical impropriety for state court judges are marked by explicit signposts. For example, judges are expressly barred from engaging in certain *ex parte* communications,⁷ serving voluntarily as character witnesses,⁸ belonging to discriminatory clubs,⁹ hearing cases in which close family members are lawyers or parties,¹⁰ and so forth. However, not all judicial ethics pathways are clearly marked. This Article focuses on the most amorphous command in all of judicial ethics—the obligation

5. See *Varnum v. Brien*, 763 N.W.2d 862, 907 (2009); Sulzberg, *supra* note 4, at A1.

6. See Sulzberger, *supra* note 4, at A1. The frontal attack on judicial independence was unapologetic and vehement:

The outcome of the election was heralded . . . as a national demonstration that conservatives who have long complained about “legislators in robes” are able to effectively target and remove judges who issue unpopular decisions.

Leaders of the recall campaign said the results should be a warning to judges elsewhere.

“I think it will send a message across the country that the power resides with the people,” said Bob Vander Plaats, an unsuccessful Republican candidate for governor who led the campaign. “It’s we the people, not we the courts.”

....

Conservative groups this year launched similar campaigns in a number of the 16 states that use merit selection, targeting supreme court justices for rulings on abortion, taxes, tort reform and health care.

....

The ouster [of the Iowa judges] was reminiscent of a retention election in California in 1986 that led to the removal of three Supreme Court justices who were portrayed as opposing the death penalty.

“Obviously it has an impact on the independence of judges and how they think of their role—I think that’s demonstrable,” said Joseph R. Grodin, a law professor who was one of the three California judges who lost a re-election bid. “But more than that,” he continued, “I think the damage is not on judges, but that courts will come to be seen and judges will come to be seen as simply legislators with robes.”

Id.

7. S.C. APP. CT. R. 501 Canon 3B(7).

8. *Id.* at Canon 2B cmt. (“A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies.”).

9. *Id.* at Canon 2C (“A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”).

10. *Id.* at Canon 3E(1)(d)(i)–(ii) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where . . . the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director or trustee of a party; [or] (ii) is acting as a lawyer in the proceeding . . .”).

of judges to avoid engaging in conduct presenting “the appearance of impropriety.”¹¹

A recent article in the *South Carolina Lawyer* asked, “What are the three most important ethical issues that lawyers face?”¹² The author answered, “Conflicts, conflicts, conflicts.”¹³ I agree and would argue that the same is true for judges. Conflicts arising from the push or pull of money, friendship, loyalty, or self-interest all have the potential for creating an appearance of impropriety, thereby placing a shadow of doubt over a judge’s fairness and impartiality.

To help judges and litigants make the adjustments needed to ensure that proceedings are conducted impartially in appearance and in fact, a safety valve exists in the form of judicial recusal, or its more self-explanatory counterpart—disqualification.¹⁴ The recusal process is available both to judges and to litigants concerned with bias, prejudice, or conflicts problems, or their appearance. By providing a mechanism for flushing impurity out of the judicial bloodstream, recusal has thus come to be recognized as “perhaps the States’ most reliable weapon for maintaining both the reality and the appearance of a ‘fair hearing in a fair tribunal’ for every litigant.”¹⁵

This Article examines decisionmaking in judicial recusal cases based on the appearance of impropriety standard. It looks at those recusal situations from two perspectives. First, the Article explores the implications of the United States Supreme Court’s decision in *Caperton v. A.T. Massey Coal Co.*,¹⁶ a case illustrating that a judge’s failure to recuse can have due process ramifications.¹⁷ As we shall see, *Caperton* also calls into question the legal test used by South Carolina’s appellate courts in evaluating a claim that a judge hearing a matter in a court below improperly refused to step aside in the face of a recusal motion.

Second, this Article considers lessons that can be learned about recusal decisions from the South Carolina Judicial Merit Selection Commission’s much-discussed ruling in 2009 concerning the qualifications of Family Court Judge F.P. (“Charlie”) Segars-Andrews.¹⁸ By a 7–3 vote taken after two separate

11. *Id.* at Canon 2.

12. Nathan M. Crystal, *Conflict Waivers [sic?]*—A Primer, S.C. LAW., Mar. 2009, at 10, 10.

13. *Id.*

14. The words “recusal” and “disqualification” are effectively synonymous and are often used interchangeably, though this Article sticks with the word “recusal” to avoid confusion. “Whereas ‘recusal’ normally refers to a judge’s decision to stand down voluntarily, ‘disqualification’ has typically been reserved for situations involving the statutorily or constitutionally mandated removal of a judge upon the request of a moving party or its counsel.” RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 3 (2d ed. 2007) (footnote omitted).

15. Conference of Chief Justices Brief, *supra* note 2, at 16.

16. 129 S. Ct. 2252 (2009).

17. *See id.* at 2256–57.

18. *See* JUDICIAL MERIT SELECTION COMM’N, REPORT OF A CANDIDATE’S QUALIFICATIONS: THE HONORABLE F.P. “CHARLIE” SEGARS-ANDREWS, FAMILY COURT, NINTH JUDICIAL CIRCUIT, SEAT 1, at 12 (S.C. 2009) [hereinafter MERIT SELECTION COMM’N REPORT], available at <http://www.scstatehouse.gov/judicialmeritpage/FinalSegarsAndrewsCharlie.pdf>.

hearings, the Commission concluded that Judge Segars-Andrews was ethically unfit to continue serving as a judge based on a family court litigant's complaint¹⁹ regarding her failure to recuse herself on appearance of impropriety grounds in a divorce case.²⁰

We begin our discussion with a brief overview of the meaning of appearance of impropriety as it is used in the Code of Judicial Conduct.

II. WHAT CONSTITUTES AN APPEARANCE OF IMPROPRIETY?

The appearance of impropriety standard appears in two places in both the prior and present version of the American Bar Association's *Model Code of Judicial Conduct*.²¹ The present version of the Code, finalized in 2007, offers the following description of what is meant by conduct giving rise to an appearance of impropriety: "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."²² The Code's reasonableness test envisions an observer of the judge's situation who is well versed in the facts—"The reasonable person employed by the judicial ethics community also possesses all the facts. This ubiquitous observer of judicial conduct is variously described as 'fully informed,' 'knowing all the circumstances,' 'know[ing] and understand[ing] all the relevant facts,' and aware of the 'totality of circumstances.'"²³

19. See *id.* at 5. The complaint filed by Mr. William R. Simpson, Jr. in affidavit form appears as Exhibit 1 to the public hearing held by the Judicial Merit Selection Commission concerning the qualifications of Judge Segars-Andrews. See *Public Hearing on Judicial Qualifications for Judge Segars-Andrews Before the Judicial Merit Selection Commission*, Exhibit 1, at 1–5 (S.C. Dec. 18, 2009) [hereinafter Public Hearing Exhibit 1], available at <http://www.scstatehouse.gov/judicialmeritpage/TranscriptInfo120209/091202fsaEx01.pdf>.

20. See MERIT SELECTION COMM'N REPORT, *supra* note 18, at 12.

21. See MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (requiring that a judge "avoid impropriety and the appearance of impropriety in all of the judge's activities"); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990) (imposing a duty upon a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned"). The ABA's 2007 version of the *Model Code of Judicial Conduct* incorporates the appearance of impropriety standard formerly found in Canon 2 into new Canon 1, see MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007). The "might reasonably be questioned" standard for disqualification formerly found in Canon 3E(1) now appears in new Rule 2.11, see MODEL CODE OF JUDICIAL CONDUCT at R. 2.11 (2007).

22. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007). The test in the 1990 Code was slightly different. See MODEL CODE OF JUDICIAL CONDUCT Canon 2A cmt. (1990) ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.").

23. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1944–45 (2010) (alteration in original) (footnotes omitted) (quoting multiple sources describing the hypothetical reasonable observer).

Under the appearance of impropriety test, it is well-established and understood that proof of actual misconduct is not required.²⁴ Of course, this means that a judge can face punishment for an appearance of impropriety violation without actually engaging in an expressly prohibited act in violation of the Code.²⁵ In other words, a judge can render a decision free from any actual bias and still be punished if, under the facts, the appearance of bias was present.

Lawyers are more fortunate. Under their parallel set of ethical standards found in the *Model Rules of Professional Conduct*, lawyers need to actually commit a wrong in order to be punished for unethical behavior; the appearance standard is not in play, though it once was.²⁶ The rationale for rejecting the appearance of impropriety prohibition in lawyer ethics cases was the vagueness of the appearance standard;²⁷ the rationale for keeping the admittedly vague appearance standard for judicial conduct is that “judges represent the system as a whole and must be both right-acting and right-appearing.”²⁸ This formulation of judges’ professional obligations exposes the daunting reality that can cause a judge to lose more than his or her sleep—conduct by a “right-acting” judge may nonetheless be “wrong-appearing” and hence unethical. When it comes to ethical behavior, being at all times “both right-acting and right-appearing” may be a challenging assignment for judges, but falling short in either respect can be a reputation or career-threatening event, as the following discussion focusing on the Caperton and Segars-Andrews matters illustrates.

III. CAPERTON AND THE IMPACT OF MONEY

A commonly repeated saying is that “money is the root of all evil.” The phrase is factually inaccurate (it overlooks other corrupting forces such as self-interest, kinship, and misplaced loyalty, for example), and it may not even be an accurate translation from its Greek heritage.²⁹ Even so, money’s utility when it comes to influencing human behavior is sufficiently well-established as to be eligible for judicial notice.

24. See *id.* at 1918.

25. See *id.*

26. Canon 9 of the ABA’s *Model Code of Professional Responsibility* was formally titled, “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 9 (1980). When the *Model Rules of Professional Conduct* superseded the Code, the appearance requirement was dropped. See Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 717 (1998).

27. See Flowers, *supra* note 26, at 766.

28. *Id.*

29. The phrase derives from a saying attributed to Jesus in the Apostle Paul’s First Epistle to Timothy in the New Testament—“For the love of money is the root of all evil.” 1 *Timothy* 6:10 (King James). A more accurate reading from the original Greek may be, “For the love of money is a root of all sorts of evil.” 1 *Timothy* 6:10 (New American Standard).

The Supreme Court's holding in *Caperton v. A.T. Massey Coal Co.*³⁰ most recently spotlighted the power of cash as a corrupting force.³¹ In *Caperton*, the Court held that a justice of the Supreme Court of Appeals of West Virginia was disqualified on due process grounds from sitting on a case involving a campaign contributor.³² The contributor's company, A.T. Massey Coal Co., had a motive for wanting to purchase judicial favor because it faced a \$50 million judgment on appeal from a jury verdict.³³

While the appeal was pending, the company's chief executive, Don Blankenship, spent \$3 million on personal campaign contributions to support Brent Benjamin as a candidate for election to the Supreme Court of Appeals of West Virginia.³⁴ In both absolute and relative terms, Blankenship's contribution to Benjamin's campaign effort was very large: "Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee."³⁵ Benjamin won the election by a narrow margin,³⁶ and when the case arrived on appeal he was greeted with a recusal motion filed by Massey's adversary, Caperton.³⁷ Justice Benjamin rejected the recusal motion, and then voted in favor of Massey when the case was heard, tipping the balance in Massey's favor by a 3–2 margin.³⁸ Thereafter, Caperton sought certiorari to the United States Supreme Court, attacking Justice Benjamin's failure to recuse himself on due process grounds.³⁹

In one of the many amicus briefs submitted in support of petitioners, the amici curiae argued, "Justice Benjamin's decision not to recuse himself from Massey's appeal—despite the staggering amount of Blankenship's campaign expenditures and the timing of those contributions in relation to Massey's appeal—creates an undeniable appearance of impropriety, if not evidence of an actual bias."⁴⁰ Writing for the majority, Justice Kennedy noted that "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"⁴¹ Applying those standards, the Court held that, under the circumstances of the case, due process required recusal.⁴² The objective

30. 129 S. Ct. 2252 (2009).

31. *See id.* at 2257, 2264–65.

32. *Id.* at 2256–57.

33. *See id.* at 2257–58.

34. *Id.* at 2257.

35. *Id.*

36. *See id.* Benjamin "received 382,036 votes (53.3%), and [his opponent] McGraw received 334,301 votes (46.7%)." *Id.*

37. *See id.*

38. *See id.* at 2257–58.

39. *See id.* at 2259.

40. Brief of Justice At Stake et al. as Amici Curiae in Support of Petitioners at 17, *Caperton* 129 S. Ct. 2252 (No. 08-22). Twenty-eight groups joined in the brief. *Id.* app. at 1.

41. *Caperton*, 129 S. Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

42. *Id.*

standards cited by Justice Kennedy in *Caperton* provide guidance for evaluating recusal arguments, particularly in cases where the judge has received a substantial benefit.

First, the Court held that a due process violation can be premised on evidence that falls short of “proof of actual bias.”⁴³ Instead, all that is needed is evidence showing “a serious risk of actual bias—based on objective and reasonable perceptions.”⁴⁴ In other words, proof of a high “probability”⁴⁵ or “serious risk of actual bias”⁴⁶ on a judge’s part not only justifies recusal, but also provides grounds for an appellate challenge to a refusal to recuse under the Due Process Clause.⁴⁷

In lieu of an inquiry into the existence of actual bias, *Caperton* instructs reviewing courts to determine “whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”⁴⁸ Recusal is required, we are told, whenever “an objective inquiry into [the conflict problem] under all the circumstances ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”⁴⁹

Justice Kennedy’s opinion in *Caperton* imported its admonition that judges are to “hold the balance nice, clear and true” from the Court’s 1927 ruling in *Tumey v. Ohio*.⁵⁰ Like *Caperton*, *Tumey* involved money as the conflicting ingredient.⁵¹ In *Tumey*, the judicial officer—who was also the town’s mayor—received a share of court costs as a salary supplement, provided that criminal defendants were convicted; the judge received nothing upon acquittals.⁵² The conviction bonus in *Tumey* was not large; the judge received a sum of \$12 when defendants were convicted.⁵³ That relatively small sum tipping one side of the scales of justice was sufficient to invoke due process concerns. The Court explained:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure

43. *Id.* at 2263.

44. *Id.*

45. *Id.* at 2259 (quoting *Withrow*, 421 U.S. at 47) (internal quotation marks omitted).

46. *Id.* at 2263.

47. *See id.* at 2263–65.

48. *Id.* at 2263 (quoting *Withrow*, 421 U.S. at 47).

49. *Id.* at 2264 (omissions in original) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

50. 273 U.S. 510, 532 (1927).

51. *See Tumey*, 273 U.S. at 531–32.

52. *See id.* at 520.

53. *Id.* at 531–32.

which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.⁵⁴

The Supreme Court's due process ruling in *Tumey* was unanimous.⁵⁵ Though *Caperton* involved more money than *Tumey* by a factor of 250,000, the *Caperton* voting margin was razor-thin.⁵⁶ The Court in *Caperton* split 5–4, which means that four sitting Supreme Court Justices concluded that the payment of the extraordinary sum of \$3 million on behalf of a party to a lawsuit to elect a favored judge—who then proceeded to cast a crucial vote in the party's favor in a \$50 million case—did not give rise to an appearance of impropriety sufficiently serious to deprive the opposing party of due process.⁵⁷

Tumey illustrates that a due process argument leveled at a sitting judge resonates strongly in a self-dealing situation—that is, when the judge is subject to temptation because of a personal financial interest in the matter's outcome.⁵⁸ A judge's disqualifying payoff need not be immediate or direct in order to raise due process concerns. Thus, in *Aetna Life Insurance Co. v. Lavoie*,⁵⁹ the Court held that an Alabama Supreme Court justice was required to recuse himself from a case alleging bad faith against an insurance company where the case had the potential for creating precedent favorable to the justice in a separate bad faith case that he was personally prosecuting.⁶⁰

Caperton illustrates that the size, timing, and targeting of judicial contributions are factors to be weighed when evaluating the consequences of a judge's financial entanglements in handling a case.⁶¹ The majority in *Caperton*

54. *Id.* at 532.

55. *See id.* at 514. It may be noted that the earlier ruling by the Ohio Court of Appeals upholding the one-sided payment system was also unanimous, for dismissal. *See State v. Tumey*, 4 Ohio Law Abs. 109, 109 (Ohio Ct. App. 1925) (holding that the court lacked power to interfere with a state statute defining the judge-mayor's jurisdiction).

56. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2256 (2009).

57. *See id.* at 2274 (Roberts, C.J., dissenting); *id.* at 2274–75 (Scalia, J., dissenting).

58. *See, e.g., Connally v. Georgia*, 429 U.S. 245, 250–51 (1977) (per curiam) (applying *Tumey* and holding that the defendant's due process rights were violated when a justice of the peace was compensated for issuance of search warrants).

59. 475 U.S. 813 (1986).

60. *See id.* at 816–19, 821–25; *see also Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (finding that due process rights of litigants were violated when a disciplinary tribunal was composed of competitors); *Rissler v. Jefferson Cnty. Bd. of Zoning Appeals*, 693 S.E.2d 321, 329 (2010) (per curiam) (holding that a zoning board member was barred from participating in a vote on a project where a member's company would receive work if the project was approved for development).

61. *See Caperton*, 129 S. Ct. at 2264. The same Justices who decided *Caperton* denied certiorari in *Dupre v. Telson Corp.*, 129 S. Ct. 200 (2008). *Dupre* was an Ohio case where a corporate executive whose company was involved in litigation had allegedly contributed \$15,000—“nearly one third of the total funds raised”—to a judge's earlier House campaign, plus additional sums exceeding \$500,000 to the Republican Party of Summit County, some of which may have

expressly validated Caperton's contention that a litigant is deprived of due process when the other side provides support for the judge sufficient to raise the likelihood that the judge would "feel a debt of gratitude" to that party.⁶²

A similar "debt of gratitude" case is *Pierce v. Pierce*.⁶³ There, the Supreme Court of Oklahoma held that recusal was required on due process grounds where opposing counsel and his father both contributed the maximum amount allowed in furtherance of a judge's campaign while the case was pending and prior to trial; also while the case was pending, opposing counsel personally solicited additional funds for the judge's campaign.⁶⁴ The court held that the risk of taint was so great that it could not apply a harmless error standard, thus necessitating reversal of the lower court's decree.⁶⁵ On the other hand, recusal has been held not to be required in cases involving a contribution of less than one percent of funds raised for a judge's campaign⁶⁶ and the donation of lavish contributions to a judge's political party by a corporate executive whose company was involved in major litigation.⁶⁷

Caperton provides a road map for litigants seeking to overturn adverse recusal rulings on appeal based on due process grounds—it teaches that a probability of bias must be shown to justify recusal based on a constitutional denial of due process. Justice Kennedy made it clear that resolving disputes over recusal decisions in most state court cases will usually be accomplished purely by enforcing state court ethical standards, without any need for applying the proof test for cases where due process rights are at issue:

been used to benefit the judge's judicial campaign. See Petition for Rehearing at 3–4, *Dupre*, 129 S. Ct. 200 (No. 08-41), 2008 WL 4792481.

62. *Caperton*, 129 S. Ct. at 2262. The Court's opinion explained:

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey*

Id. The Supreme Court's acceptance of Caperton's argument thus enshrines "debt of gratitude" in the appearance of impropriety test lexicon. See *id.*

63. 39 P.3d 791 (Okla. 2001).

64. *Id.* at 798–99.

65. See *id.* at 799–800.

66. See *Dumas v. Auto Club Ins. Ass'n*, 789 N.W.2d 444, 444–45 (Mich. 2010).

67. See Petition for Rehearing, *supra* note 61, at 3–4; see also *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 547 U.S. 1003 (2006); *In re Disqualification of Burnside*, 863 N.E.2d 617 (Ohio 2006), *cert. denied*, 549 U.S. 883 (2006). *Burnside* involved allegations of impartiality against a judge based on campaign contributions that the judge had received in the past. See *Burnside*, 863 N.E.2d at 618–19. In *Avery*, a state supreme court justice had allegedly received "more than \$1 million in direct and indirect campaign contributions from a party and its supporters, while that party's case [was] pending." Petition for a Writ of Certiorari, *Avery*, 835 N.E.2d 801 (No. 05-84), 2005 WL 3662258.

“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today.” Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.⁶⁸

Caperton will have a direct impact on appellate standards in state recusal cases that require proof of actual bias in order to overturn a lower court judge’s refusal to recuse.⁶⁹ It directly calls into question the validity of a recent South Carolina recusal case, *Simpson v. Simpson*,⁷⁰ which held that a complainant must make a “showing of actual prejudice” in order to overturn a trial court judge’s refusal to recuse.⁷¹ *Caperton*, of course, rejects any requirement that a party present on appeal some proof of actual bias or prejudice in order to win a reversal premised on a lower court judge’s failure to recuse.⁷² This result, tied to due process requirements, plainly amounts to lowering the bar for proof of unethical conduct, and makes it likely that judges’ ethical behavior will be

68. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (citation omitted) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

69. See, e.g., *Irvin v. State*, 49 S.W.3d 635, 643 (Ark. 2001) (holding that a showing of actual bias or prejudice is needed in order to require recusal of trial judge); *Simpson v. Simpson*, 377 S.C. 519, 526, 660 S.E.2d 274, 278 (Ct. App. 2008) (per curiam) (holding that the moving party “failed to present any evidence of prejudice or bias”); *State v. Neeley*, 748 P.2d 1091, 1094 (Utah 1988) (“[W]hile we recommend the practice that a judge recuse himself where there is a colorable claim of bias or prejudice, absent a showing of actual bias or an abuse of discretion, failure to do so does not constitute reversible error . . .”).

70. 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (per curiam).

71. *Id.* at 525, 660 S.E.2d at 277. South Carolina is by no means alone in adhering to an actual bias standard for mandatory recusal. See, e.g., *Hunt v. State*, 642 So. 2d 999, 1051–55 (Ala. Crim. App. 1993) (per curiam) (finding that despite “the appearance of impropriety,” a trial judge’s conduct did not require recusal); *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) (holding a judge should have recused himself where there was “obvious bias”); *State v. Canales*, 916 A.2d 767, 782 (Conn. 2007) (“Even if we were to agree that an appearance of bias arose from [the] circumstances, we would not conclude that the trial court’s actions violated due process without some indication of actual bias.”); *Cowan v. Bd. of Comm’rs of Freemont Cnty.*, 148 P.3d 1247, 1260 (Idaho 2006) (“[W]e require a showing of actual bias before disqualifying a decision maker even when a litigant maintains a decision maker has deprived the proceedings of the appearance of fairness.” (citing *Davisco Food Int’l, Inc. v. Gooding Cnty.*, 118 P.3d 116, 123–24 (Idaho 2005))). But see *State v. Brown*, 776 P.2d 1182, 1188 (Haw. 1989) (“[T]his ruling may have the effect of sometimes barring ‘trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.’ Yet, ‘justice must satisfy the appearance of justice.’” (citation omitted) (quoting *In re Murchison*, 349 U.S. 133, 136 (1954); *Offutt v. United States*, 348 U.S. 11, 14 (1954))); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) (“[T]here need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns.”).

72. See *supra* text accompanying notes 43–47.

scrutinized more often and more closely in the future. *Caperton* gives a green light to suspicious litigants by moving the proof threshold from the realm of practical impossibility to a zone in which reversal based on ethical misconduct (or the appearance of the same) can actually occur. Unquestionably, proving that a judge is subject to a serious risk of bias is far easier than proving that the judge's ruling actually was affected by bias.

Since proof of a serious *risk* of judicial bias establishes a due process violation under *Caperton*, the need for a showing of *actual* prejudice in order to win a recusal case in South Carolina is a requirement that in effect has been overruled. This result is only fair. After all, why should a litigant whose trial has been tainted by the judge's violation of the appearance of impropriety standard (i.e., unethical behavior on the judge's part) have to prove something more than that in order to prevail on appeal?

IV. RECUSAL BASED ON THE APPEARANCE STANDARD IN SOUTH CAROLINA TODAY

The most prominent recusal case in South Carolina is an oddity. Though it has been said that the case's outcome has left South Carolina judges "terrified,"⁷³ the matter was not decided by any court or judicial ethical tribunal; rather, the decision was handed down by the South Carolina Judicial Merit Selection Commission in late 2009 in connection with Judge F.P. ("Charlie") Segars-Andrews's application for reappointment to the Family Court in Charleston.⁷⁴ The Commission's decision was in response to a complaint filed by William R. Simpson, Jr., who was disgruntled over Judge Segars-Andrews's handling of his domestic case.⁷⁵

By the time Judge Segars-Andrews appeared before the Judicial Merit Selection Commission, her ethical conduct in dealing with Mr. Simpson's complaint had already been the subject of a ruling at the trial court level (by her),⁷⁶ a ruling by the South Carolina Court of Appeals in *Simpson v. Simpson*,⁷⁷ and a ruling by the South Carolina Supreme Court's Commission on Judicial

73. Robert Behre, *Lawyer: 'Every Judge I Know Is Terrified,'* POST & COURIER (Charleston, S.C.), Dec. 16, 2009, at B1.

74. See MERIT SELECTION COMM'N REPORT, *supra* note 18, at 4–5.

75. See Public Hearing Exhibit 1, *supra* note 19, at 1–5 (affidavit of William R. Simpson, Jr.).

76. Judge Segars-Andrews's order ruling on Mr. Simpson's recusal motion is contained in the record on appeal in *Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (per curiam), which was incorporated as Exhibit 16 to the public hearing on Judge Segars-Andrews's qualifications before the Judicial Merit Selection Commission. See *Public Hearing on Judicial Qualifications for Judge Segars-Andrews Before the Judicial Merit Selection Commission*, Exhibit 16, pt. 1, at 88–102 (S.C. Dec. 18, 2009) [hereinafter *Simpson Appellate Record*], available at <http://www.scstatehouse.gov/judicialmeritpage/TranscriptInfo120209/091202fsaEx16p1.pdf>.

77. 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (per curiam).

Conduct.⁷⁸ In each case, the ruling had been favorable to Judge Segars-Andrews.⁷⁹ The Judicial Merit Selection Commission's ruling was different.⁸⁰ Evaluating Judge Segars-Andrews's suitability to serve another six-year term on the Family Court, the Commission considered her qualifications in light of the Commission's nine evaluative criteria.⁸¹ By a vote of 7–3, the Commission determined that she met all the criteria except one—ethical fitness.⁸² Because of that important failing, Judge Segars-Andrews's reappointment was prevented from being voted on by the General Assembly, and she lost her judgeship.⁸³

Many people, including lawyers and judges, may have difficulty understanding how a judge's behavior that passes muster with an appellate court and the Commission on Judicial Conduct can be held improper and unethical by any other group. The remainder of this Article addresses that legitimate concern. The aim is twofold—first, to explain why, based on the underlying facts, the Judicial Merit Selection Commission found that Judge Segars-Andrews erred in failing to recuse based on an appearance of impropriety, and second, to identify lessons that can be drawn from the episode that may be of value to judges who are called to deal with recusal issues in the future.

V. FACTS UNDERLYING THE SEGARS-ANDREWS RULING

Judge Segars-Andrews presented herself to the Commission for screening as a veteran and respected jurist.⁸⁴ She had served continuously since having first been elected in 1993 to serve on the Family Court of the Ninth Judicial Circuit.⁸⁵ Her various professional accomplishments included work on the Charleston County Drug Court, for which she received recognition in the form of a unanimous resolution passed by the South Carolina House in 2008.⁸⁶ Through

78. See *Public Hearing on Judicial Qualifications for Judge Segars-Andrews Before the Judicial Merit Selection Commission*, Exhibit 5, at 7–9 (S.C. Dec. 18, 2009) [hereinafter Public Hearing Exhibit 5], available at <http://www.scstatehouse.gov/judicialmeritpage/TranscriptInfo120209/091202fsaEx05.pdf> (correspondence from the Office of Disciplinary Counsel to Mr. Simpson).

79. See *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 115 & n.1, 691 S.E.2d 453, 456 & n.1 (2010) (per curiam).

80. See MERIT SELECTION COMM'N REPORT, *supra* note 18, at 5–12.

81. See *id.* at 2. The Commission evaluates a candidate based on whether he or she meets (1) the requisite constitutional and statutory requirements, as well as the standards for: “(2) ethical fitness; (3) professional and academic ability; (4) character; (5) reputation; (6) physical health; (7) mental stability; (8) experience; and (9) judicial temperament.” S.C. CODE ANN. § 2-19-35(A) (2005).

82. See MERIT SELECTION COMM'N REPORT, *supra* note 18 at 31.

83. See *Segars-Andrews*, 387 S.C. at 114–15, 691 S.E.2d at 456.

84. See *id.* at 114, 691 S.E.2d at 456.

85. *Id.* at 114, 691 S.E.2d at 456.

86. H.R. 5292, 117th Gen. Assemb., Reg. Sess. (S.C. 2008), available at http://www.scstatehouse.gov/sess117_2007-2008/hj08/5368.htm#p5447.

that resolution, the South Carolina House voted “to honor her for the exceptional difference she [had] made in Charleston County.”⁸⁷

When she appeared before the Judicial Merit Selection Commission in November of 2009, Judge Segars-Andrews faced no opposition; she had every reason to believe her reelection would follow in due course, provided she was found qualified and nominated by the Commission.⁸⁸ There was, however, an impediment standing in her way—a disgruntled family court litigant, Mr. William R. Simpson, Jr., who had filed a complaint with the Commission attacking Judge Segars-Andrews’s refusal to recuse herself in the face of a disqualification motion he had made in connection with his divorce case.⁸⁹ Both Mr. Simpson and his divorce lawyer, Steven S. McKenzie, appeared at the hearing and testified against Judge Segars-Andrews.⁹⁰ To understand the story told at the Segars-Andrews hearing, it is necessary to first understand the facts underlying Mr. Simpson’s divorce case and Judge Segars-Andrews’s role as a decisionmaker in the matter.

Mr. Simpson’s ethics attack on Judge Segars-Andrews was a by-product of two failed marriages in which the two husbands, both Clarendon County farmers, were father and son.⁹¹ The men owned a family farming operation, Simpson Farms, LLC, in which both were members.⁹² The father, William Robert Simpson, Sr., was divorced from his wife, Daisy Wallace Simpson, in 2004.⁹³ The focal point for consideration of Judge Segars-Andrews’s qualification is her rulings in the subsequent Simpson family divorce case, this one involving the son, Mr. William R. Simpson, Jr.⁹⁴

The lawyers in both Simpson family divorce cases were the same—Jan Warner and James McLaren represented the wife in each matter, and Steven McKenzie and Scott Robinson represented the husbands.⁹⁵ Additionally, Mr. Simpson was a party defendant in his father’s earlier divorce case due to his co-ownership interest in Simpson Farms, LLC.⁹⁶ Thus, Mr. Simpson and his lawyers were involved in both Simpson family divorce cases. Judge Segars-

87. *Id.*

88. *See Segars-Andrews*, 387 S.C. at 115, 691 S.E.2d at 456.

89. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 5–8.

90. *See id.* at 9–10.

91. *Id.* at 21 (comments of Professor John P. Freeman).

92. *Id.*

93. *See* Simpson Appellate Record, *supra* note 76, at 14–56.

94. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 5–6. Henceforth, when this Article refers to “Mr. Simpson,” it is referring to Mr. William R. Simpson, Jr., and Mr. William R. Simpson, Sr. will be designated as such. When the Article refers to “Mrs. Simpson,” it is referring to Mrs. Becky Simpson, Mr. Simpson’s ex-wife.

95. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 21 (comments of Professor John P. Freeman).

96. *See id.*

Andrews had no involvement in the prior divorce case between Mr. Simpson, Sr. and Mrs. Daisy Simpson.⁹⁷

Our focus now turns to the second Simpson family divorce case, brought by Mr. Simpson, the son. On July 30, 2004, Mr. Simpson brought his domestic case against his wife of nearly fifteen years as an action for “Separate Maintenance and Support and for Approval of an Agreement.”⁹⁸ As originally formulated by Mr. Simpson and his legal counsel, the second Simpson domestic case was not a true adversary proceeding; Mrs. Simpson had been induced to sign a “Pro Se Answer” at the time the complaint was filed.⁹⁹ Mr. Simpson’s lawyer drafted both the complaint served on Mrs. Simpson as well as the answer that she filed.¹⁰⁰ Mrs. Simpson signed the agreement at her husband’s lawyer’s office, without having her own lawyer present.¹⁰¹ Under that agreement, Mrs. Simpson gave up her right to substantial marital assets.¹⁰²

When the Family Court initially approved the agreement, Mrs. Simpson appeared pro se.¹⁰³ She subsequently retained her own lawyers, and then challenged the agreement for various reasons.¹⁰⁴ In seeking to overturn the agreement, Mrs. Simpson’s lawyers challenged her competence to enter into the agreement based on her “mental condition/status when the agreement was executed and approved,”¹⁰⁵ claims of nondisclosure by Mr. Simpson, and her contention that “there had been frauds perpetrated against both [her] and the Court.”¹⁰⁶ Judge McFadden, who initially approved the one-sided agreement

97. Judge R. Wright Turbeville handed down the final decree of divorce in that case. *See* Simpson Appellate Record, *supra* note 76, at 56.

98. Simpson Appellate Record, *supra* note 76, at 58 para. 1.

99. *Id.* at para. 2 An order later entered in Mr. Simpson’s divorce case by Judge Segars-Andrews made the following findings:

On or about July 30, 2004, Husband took Wife, accompanied by her elderly grandfather, to his attorney who had prepared a separation agreement for Husband and Wife to sign. Wife signed the agreement. It was then approved by The Honorable George E. McFadden and made the order of the family court on August 20, 2004. Subsequently, Wife filed a motion to set aside the agreement. This motion was granted by Judge McFadden on January 6, 2005.

Id. at 107 para. 11.

100. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 21 (comments of Professor John P. Freeman).

101. Simpson Appellate record, *supra* note 76, at 107 para. 11.

102. In their Motion to Vacate Order and Set Aside Agreement, Mrs. Simpson’s attorneys argued, “Of more than \$700,000.00 in assets acquired by Husband, Wife is to receive approximately 5 percent (5%) which is totally unreasonable and far from equitable.” Simpson Appellate Record, *supra* note 76, at 163 para. 25.

103. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 22 (comments of Professor John P. Freeman).

104. *See* Simpson Appellate record, *supra* note 76, at 57–59.

105. *Id.* at 58 para. 6. Mrs. Simpson had been diagnosed with panic and bipolar disorders, and also suffered from depression and anxiety attacks. *Id.* at 59 para. 8(1).

106. *Id.* at 58–59 para 6.

executed by Mrs. Simpson when she was not represented by counsel, subsequently set it aside at the behest of her newly hired attorneys.¹⁰⁷

By the time Judge Segars-Andrews arrived on the scene, the separation agreement—created on behalf of Mr. Simpson to eliminate his wife’s rights to a substantial share of the marital assets—had already been set aside.¹⁰⁸ Mr. Simpson had already been granted a divorce based on his wife’s adultery, which evidently occurred after she had been induced to enter into the one-sided separation agreement.¹⁰⁹ The issues that Judge Segars-Andrews ruled on concerned visitation, equitable division, and attorneys’ fees and costs.¹¹⁰

The Family Court hearing in the Simpson divorce covering those issues was held on February 14 and 16, 2006.¹¹¹ On March 13, 2006, the court issued detailed written instructions for a final order on all remaining issues and requested that Mrs. Simpson’s counsel, Mr. Warner and Mr. McLaren, prepare and submit a proposed order consistent with those instructions.¹¹² For our purposes, the crucial determination made by Judge Segars-Andrews and set forth in her instructions, dealt with the legal fees—specifically, her instruction that Mr. Simpson be required to pay half of the fees incurred by his wife in the matter.¹¹³ The basis for this ruling harkened back to the separation agreement devised by Mr. Simpson and his lawyer and signed by Mrs. Simpson before she had her own legal counsel.

Had the short-lived agreement as drafted by Mr. Simpson’s lawyer not later been challenged by Mrs. Simpson’s attorney and then thrown out by Judge McFadden, Mr. Simpson’s later ethics-based attack on Judge Segars-Andrews’s qualifications almost certainly would not have arisen. This is because, absent that agreement, the property split between the husband and wife in divorce would have been sixty to forty in the husband’s favor, with each side paying its own fees. Had this occurred, Mr. Simpson almost certainly would not have raised any complaint about the judge’s fairness.

As noted above, Judge Segars-Andrews ultimately determined that Mr. Simpson should be required to cover half of his wife’s legal fees. She discussed why she did so in her testimony at the hearing before the Judicial Merit Selection Commission:

107. *See id.* at 57–61.

108. The voided agreement came up before Judge Segars-Andrews based on Mr. Simpson’s contention that he should be given credit for money he had paid his wife under it. As to this contention, Judge Segars-Andrews ruled, “The Court finds that the agreement was unconscionable and that Plaintiff would have otherwise been supporting Wife during this period. This Court concludes that the Husband should be given no credit for this.” *Id.* at 115 para. 42.

109. *See id.* at 83 para 1.

110. *Id.* at 104. A consent order dated March 7, 2006 had resolved the issues of visitation and custody. *Id.*

111. *Id.*

112. *See id.* at 367–70.

113. *Id.* at 369.

Then I go to the issue of attorneys' fees. What has not come out is that initially Mr. Simpson had his wife sign an agreement. That agreement gave her, I believe, and I don't remember exactly like, [\$]35- or \$40,000 [in] all. And this was an estate worth [\$]7- or \$800,000. So she had to hire attorneys to have that agreement overturned, so she could get some assets.

That is—if this case had come up without that fact, he probably would have not—I would have not ordered him to pay any attorneys' fees except a little bit for the experts because they gave me the information that I had to deal with.

....

If he had not had her sign that agreement, he would have prevailed on every issue, and I would not have ordered attorneys' fees. But [because of] having her sign the agreement where she had to hire attorneys to overturn it[,] [s]he did prevail because she did end up getting her 40 percent of the whole. And I, following the rules of Family Court, the statute and the case law, I had to order attorneys' fees.¹¹⁴

The attorneys' fee award in favor of Mrs. Simpson approved by Judge Segars-Andrews following the trial was approximately \$78,000.¹¹⁵ Though the amount may seem high, Mr. Simpson's counsel never disputed the factual representations within Mrs. Simpson's fee petition supporting the request.¹¹⁶ Stated differently, Mr. Simpson presented no evidence showing that the fees sought by counsel for Mrs. Simpson were unreasonable. Earlier, in Mr.

114. Transcript of Public Hearing on Judicial Qualifications, Afternoon Session at 24–25 (Nov. 4, 2009) [hereinafter Transcript of Nov. 4 Public Hearing, Afternoon Session], *available at* <http://www.scstatehouse.gov/judicialmeritpage/TranscriptInfo120209/TranscriptInfoDecember2009.html> (follow “Judge Segars-Andrews Testimony in Public Hearing on November 4, 2009, Day 3” hyperlink).

115. *See* Simpson Appellate Record, *supra* note 76, at 125–27. Before the Commission, Mr. Simpson's counsel appeared to contend that the award of \$78,000 in fees was particularly improper because Judge Myers had already ordered him to pay \$37,500 as an advance for attorneys' fees. *See* Transcript of Nov. 4 Public Hearing, Afternoon Session, *supra* note 114, at 67–69. However, Judge Segars-Andrews ruled that the \$37,500 would be treated as an advance of Mrs. Simpson's equitable distribution proceeds, meaning that Mr. Simpson was given credit for the \$37,500 payment in figuring the amount owed to Mrs. Simpson out of her 40% of marital assets. *See* Simpson Appellate Record, *supra* note 76, at 115 para. 43, 121 para. 60.

116. In the court's Final Order for Equitable Division, Child Support, Attorneys' Fees, and Costs, Judge Segars-Andrews noted, “At the close of Defendant's case, Defendant [Mrs. Simpson] presented an affidavit and testimony with regard to attorneys' fees. There was no reply testimony from the Plaintiff [Mr. Simpson], and Defendant's testimony and exhibits in this regard are uncontradicted.” Simpson Appellate Record, *supra* note 76, at 123 para. 67.

Simpson's father's related case, Judge Turbeville had ordered Mr. Simpson, Sr. to pay \$85,000 toward his wife's fees.¹¹⁷ This was in addition to the \$15,000 that he had been ordered to pay at an earlier hearing.¹¹⁸ Thus, in the first Simpson divorce case, Mr. Simpson, Sr. had been ordered to pay \$100,000 toward his wife's legal fees. Accordingly, the fee approved by Judge Segars-Andrews in the second Simpson divorce case was both unchallenged, and was also in line with a fee award granted by a different judge on behalf of the wife in the earlier Simpson divorce case.

After trial—and subsequent to Judge Segars-Andrews's issuance of instruction for drawing the order on the remaining issues (including the fee award to Mrs. Simpson)—Mr. Simpson raised for the first time an ethics issue targeting Judge Segars-Andrews. He did so by filing a Notice of Motion and Motion for a New Trial Based Upon the Failure of the Defendant's Counsel to Disclose the Court's Conflict of Interests,¹¹⁹ which contended that Judge Segars-Andrews was disqualified because her husband's law partner, Lon Shull of the Charleston Bar, had rendered an affidavit fourteen months earlier in support of the fee petition submitted by McLaren and Warner in the father's divorce case.¹²⁰ Mr. Simpson testified in an affidavit accompanying his motion that he had been a party to his parents' divorce case in which Mr. Shull's affidavit had been filed, and that he was not aware that Mr. Shull was Judge Segars-Andrews's husband's law partner until after Judge Segars-Andrews had tried his case and issued her instructions as to fees.¹²¹ No evidence was presented suggesting that Judge Segars-Andrews was aware of Mr. Shull's involvement in Mr. Simpson's father's divorce case until his lawyer brought it to her attention after Mr. Simpson's divorce case was tried.

Judge Segars-Andrews subsequently denied the motion for recusal premised on the Shull affidavit filed in Mr. Simpson's father's case.¹²² If Mr. Simpson's recusal complaint had rested entirely on the contention that Judge Segars-Andrews was required to recuse herself because of the affidavit that Mr. Shull had filed, Judge Segars-Andrews would almost certainly still be a Family Court judge. On those facts, an appearance of impropriety claim was simply too

117. *Id.* at 71.

118. *See id.* at 16 para. 8.

119. *Id.* at 209–11.

120. *See id.* at 209–10 paras. 1–3. I note in passing that Mr. Shull's affidavit does more than simply opine on a reasonable fee number for Mr. Warner and Mr. McLaren based on the facts of Mr. Simpson, Sr.'s divorce case; it also excoriates Mr. Simpson, Sr. for "deception, delay and obfuscation," *id.* at 219 para. 24, and refers to "the apparent conspiracy of a father and son," *id.* at para. 26. Within the affidavit itself, Mr. Shull identifies himself as a partner in the firm of Andrews and Shull, *id.* at 213 para. 3, and most pages of the affidavit in the court record have a fax header indicating that it was sent from the firm, *see id.* at 213–23.

121. *See id.* at 227–28.

122. *Id.* at 88–101.

attenuated and ephemeral to require recusal.¹²³ However, as described below, Judge Segars-Andrews's reflection on Mr. Simpson's motion led her to realize that a second, more legitimate basis existed for recusal, one not yet known to Mr. Simpson. She raised this second matter sua sponte at a hearing convened to cover the recusal issue. On the record she made the following comments to the parties, outlining the nature of the problem and her views on its impact:

Okay; this is *Simpson versus Simpson*, Case Number 04-243 and 315—I think it's been consolidated. This started out as a motion filed by the plaintiff asking me to recuse myself because my husband's law partner was involved in another, arguably, related case.

I denied that motion; however, once it was—I mentioned this to my husband, I was told that—something that I had forgotten—Mr. McLaren and my husband's law firm has also been involved in another matter together that does—not involving a small amount of money, and it is something that if I had remembered that I would have disclosed and asked you initially if you wanted me to recuse myself.

I did not think about that, so I'm going to have to recuse myself. You all have to retry the case.

....

... I mean, I understand the canons, and if I had thought about this on the first day of trial, I would have disclosed it and said, you all need to find another judge.

I did not think about it. I heard the case, I decided the case. When you sent me that motion, I thought it was a frivolous motion, and I was talking to my husband about it and he said, did you think about this? You know, and I just—I mean, I just do not think in good conscience—I mean, that is not a small amount of money, and it was a few years ago, but, still—and it's something that I don't think would prejudice any judge, but it still should have been disclosed; and, I can't, at this point, remedy that.

123. See, e.g., S.C. Advisory Comm. on Standards of Judicial Conduct, Op. 04-2010 (2010) [hereinafter Advisory Comm. on Standards of Judicial Conduct], available at <http://www.judicial.state.sc.us/advisoryopinions/displayadvopin.cfm?advOpinNo=04-2010> (explaining that a judge is not disqualified on appearance grounds based solely on a spouse's involvement as co-counsel in a different case). Here, there is no evidence that Judge Segars-Andrews's husband had *any* involvement at all in Mr. Simpson's father's case. Moreover, his law partner's only involvement was as a witness on the reasonableness of Mrs. Daisy Simpson's lawyers' fee petition. See *supra* note 120 and accompanying text.

It should have been disclosed, I didn't think about it, so I didn't disclose it. I don't see how I can remedy it.¹²⁴

Following her oral comments indicating that she needed to recuse herself, Judge Segars-Andrews received a memorandum of law from Mrs. Simpson's counsel,¹²⁵ bolstered by an ethics expert's supporting affidavit.¹²⁶ The combined effect of the memorandum and the affidavit caused her to reverse course and conclude that she had no disabling conflict requiring recusal, but instead had a "duty to sit" in the case.¹²⁷

It was Mr. Simpson's appeal from Judge Segars-Andrews's refusal to recuse herself that triggered the decision by the South Carolina Court of Appeals in *Simpson v. Simpson*.¹²⁸ There, the court affirmed Judge Segars-Andrews's order denying the recusal motion and concluded that Mr. Simpson failed to establish that he was prejudiced by any alleged unprofessional conduct on the part of Judge Segars-Andrews.¹²⁹ Subsequently, Mr. Simpson filed an ethics charge asserting the same facts against Judge Segars-Andrews before the Commission on Judicial Conduct, and the Commission dismissed the charge.¹³⁰

By the time she appeared before the Judicial Merit Selection Commission, Judge Segars-Andrews's decision not to recuse herself in *Simpson* had thus been endorsed by an ethics expert, upheld by a reviewing appellate court, and found proper by the Commission on Judicial Conduct. In light of this history, she obviously had good reason to expect smooth sailing before the Judicial Merit Selection Commission, even in the face of the ethics complaint (Mr. Simpson's fourth separate attack¹³¹) that had been filed against her.

124. Simpson Appellate Record, *supra* note 76, at 135–37.

125. *See id.* at 231–42.

126. *See id.* at 319–27.

127. *See id.* at 93–97, 101. For a discussion questioning the appellate court's "duty to sit" analysis in *Simpson v. Simpson*, see Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 941 (2009).

128. 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (per curiam).

129. *Id.* at 526, 660 S.E.2d at 278.

130. *See supra* note 78 and accompanying text. Both the ethical grievance and the ruling by the Supreme Court's Office of Disciplinary Counsel were presented to the Commission on Judicial Conduct for review. *See* Public Hearing Exhibit 5, *supra* note 78, at 3–9. In his testimony before the Judicial Merit Selection Commission, Mr. Simpson's counsel suggested that the Commission on Judicial Conduct simply rejected the grievance out of hand without careful consideration; the implication was that partiality was shown by the disciplinary authorities in favor of Judge Segars-Andrews, who was then serving as vice chairman of the Commission on Judicial Conduct. *See* MERIT SELECTION COMM'N REPORT, *supra* note 18, at 10. There was never any proof that either the Office of Disciplinary Counsel or the Commission on Judicial Conduct improperly handled the grievance against Judge Segars-Andrews. *See* MERIT SELECTION COMM'N REPORT, *supra* note 18, at 27 (comments of Professor John P. Freeman).

131. Mr. Simpson filed his first complaint against Judge Segars-Andrews in family court, the second was lodged before the South Carolina Court of Appeals, and the third was filed before the Commission on Judicial Conduct. *See* MERIT SELECTION COMM'N REPORT, *supra* note 18, at 6–8.

There would be no smooth sailing for Judge Segars-Andrews before the Judicial Merit Selection Commission, however. When asked by the Commissioners about the size of the fee that came to her husband's law firm, Judge Segars-Andrews responded, "I think it was probably around [\$]300,000. That's my guess."¹³² A Commissioner then asked her whether that was her husband's share or if the fee represented the gross sum that was split between Judge Segars-Andrews's husband and his law partner, Mr. Shull, to which she replied, "I think that was probably my husband's share on that case."¹³³

When added together, the facts before the Commission showed that while Mr. Simpson's divorce case was pending, and about one year before Judge Segars-Andrews tried the property and fee issues in that case, her husband received a \$300,000 share of a fee flowing from a case handled by his law partner and Mrs. Simpson's counsel.¹³⁴ From the standpoint of Judge Segars-Andrews's husband, the \$300,000 payment was basically a windfall, since it was his personal share of his law firm's fee in a case he did not handle. It was her focus on this large payment—originally described by her to the parties as "not involving a small amount of money"—that led Judge Segars-Andrews to originally conclude that she needed to recuse herself.¹³⁵ The sum her husband had received as a fee from Mrs. Simpson's lawyer truly was not "a small amount of money." It was more than what Judge Segars-Andrews could earn for two years' service as a family court judge.¹³⁶

In his recusal motion before Judge Segars-Andrews, Mr. Simpson contended that the proceedings had been contaminated by "at least the appearance of impropriety."¹³⁷ Judge Segars-Andrews never addressed this contention in the order she wrote rejecting Mr. Simpson's recusal motion; to be precise, in her order denying recusal, she never explicitly mentioned the important phrase, "appearance of impropriety."¹³⁸ Nor was that ethical standard ever mentioned or referred to by Mrs. Simpson's lawyers or their ethics expert when they argued to

132. Transcript of Nov. 4 Public Hearing, Afternoon Session, *supra* note 114, at 36.

133. *Id.* In fact, in her order addressing Mr. Simpson's recusal motion, Judge Segars-Andrews had disclosed the following:

In approximately 2003[,] Mr. McLaren and Mr. Shull began representing a Plaintiff in a wrongful death case. That case was settled in December 2004. The settlement was paid in early 2005. At that time[,] Andrews and Shull received a six figure contingency fee[,] which was divided between Mr. Shull and Mr. Andrews per their partnership agreement.

Simpson Appellate Record, *supra* note 76, at 91 n.3.

134. See MERIT SELECTION COMM'N REPORT, *supra* note 18, at 26 (comments of Professor John P. Freeman).

135. Simpson Appellate Record, *supra* note 76, at 135.

136. The current annual pay rate for a family court judge in South Carolina is \$126,883. *SC Salary Database*, THE STATE (July 23, 2010), <http://www.thestate.com/statesalaries/?appSession=858201458224837> (choose "Judicial Department" from the "Agency" drop-down box; then type "Family Court" in the "Title" search field).

137. Simpson Appellate Record, *supra* note 76, at 228.

138. See *id.* at 88–102.

Judge Segars-Andrews that she owed a duty to sit in the case and not recuse herself.¹³⁹ Moreover, the phrase “appearance of impropriety” does not appear anywhere in Mrs. Simpson’s brief filed before the Court of Appeals,¹⁴⁰ even though Mr. Simpson’s brief argued that the appearance standard had been violated and used the phrase “appearance of impropriety” ten different times.¹⁴¹

In siding with Mrs. Simpson, the Court of Appeals decided *Simpson v. Simpson* without the phrase “appearance of impropriety” showing up anywhere in its ruling, even though Mr. Simpson based his argument principally on the contention that the appearance standard had been violated.¹⁴² Nor was the phrase ever used by the Commission on Judicial Conduct in denying Mr. Simpson’s grievance against Judge Segars-Andrews; the Commission dismissed Mr. Simpson’s grievance at a preliminary stage without a full factual analysis.¹⁴³

One enduring legacy arising from the Segars-Andrews incident will be this—rulings issued in cases where the existence of an appearance of impropriety is alleged against a judge need to confront that issue, rule on it, and provide reasons supporting the ruling. Rulings that dance around the issue, or avoid it entirely, resolve nothing and are counterproductive in that they enhance the complaining party’s suspicion that, in the vernacular, “The fix is in.”

Though Mr. Simpson’s appearance of impropriety charge never achieved traction before Judge Segars-Andrews or in the Court of Appeals, things changed when he made the same argument before the Judicial Merit Selection Commission. The appearance of impropriety charge resonated in that forum. The key witness in favor of Mr. Simpson’s position was neither Mr. Simpson nor his lawyer; instead, it was Judge Segars-Andrews herself, speaking to the Commission from the printed word found in the family court record for *Simpson*.¹⁴⁴ It was impossible for the Commission to ignore the strong unequivocal language used by Judge Segars-Andrews when she first described the fee conflict issue to Mr. Simpson and his lawyer:

Mr. McLaren and my husband’s law firm [have] also been involved in another matter together that does—not involving a small amount of money, and *it is something that if I had remembered that I would have disclosed and asked you initially if you wanted me to recuse myself.*

139. *See id.* at 307–27.

140. *See* Final Brief of Respondent, *Simpson v. Simpson*, 377 S.C. 519, 660 S.E.2d 274 (Ct. App. 2008) (per curiam) (No. 2004–DR–14–243 & 315).

141. *See* Final Brief of Appellant at 11–14, *Simpson*, 377 S.C. 519, 660 S.E.2d 274 (No. 2004–DR–14–243 & 315).

142. *Simpson*, 377 S.C. at 521–26, 660 S.E.2d 275–78.

143. *See* Public Hearing Exhibit 5, *supra* note 78, at 7–9. Indeed, the Commission ruled that not only was recusal over Judge Segars-Andrews’s husband’s fee not required, but that Judge Segars-Andrews was not even “ethically required” to make a disclosure about the \$300,000 fee paid by the wife’s lawyer. *See id.* at 8.

144. *See* MERIT SELECTION COMM’N REPORT, *supra* note 18, at 6–8.

I did not think about that, so I'm going to have to recuse myself. You all have to retry the case.

....

. . . [I]f I had thought about this on the first day of trial, *I would have disclosed it and said, you all need to find another judge.*

. . . [I]t's something that I don't think would prejudice any judge, but *it still should have been disclosed; and, I can't, at this point, remedy that.*

*It should have been disclosed, I didn't think about it, so I didn't disclose it. I don't see how I can remedy it.*¹⁴⁵

If this were not strong enough, Judge Segars-Andrews then went on to make clear that these were not off-the-cuff remarks, but that she had already carefully studied the issue; she stated, “*I have looked at the Rules over and over, because I feel like I really have done a disservice by not disclosing this and causing your clients to have to go through another trial.*”¹⁴⁶

In essence, the Commission agreed with Judge Segars-Andrews's words, which conceded a conflict problem that was sufficiently serious to call for full and prompt disclosure to the parties who then would have had a right to agree or disagree on remittal of disqualification.¹⁴⁷ The disclosure was made later than it should have been,¹⁴⁸ meaning that the looming appearance problem had become aggravated in Mr. Simpson's eyes at the time of disclosure.¹⁴⁹ The aggravating factor arose when Judge Segars-Andrews issued her instruction that Mr. Simpson was to pay the McLaren-Warner team nearly \$80,000 toward his wife's

145. Simpson Appellate Record, *supra* note 76, at 135–37 (emphasis added).

146. *Id.* at 139 (emphasis added).

147. See S.C. APP. CT. R. 501, Canon 3F (“A judge . . . may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.”).

148. The disclosure should have been made at the outset; ignorance of the large fee was no defense. Judge Segars-Andrews was under an ethical obligation to “make a reasonable effort to keep informed about the personal economic interests of [her] spouse.” *Id.* at Canon 3E(2). Failure to disclose can itself provide a basis for a recusal motion: “When a judge fails to disclose information to the parties that the judge knew or should have known, this failure to disclose could provide the basis for a motion to disqualify.” Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 69 (2000).

149. See MERIT SELECTION COMM'N REPORT, *supra* note 18, at 19.

legal fees¹⁵⁰—far more than he was paying his own lawyer.¹⁵¹ Mr. Simpson could not have been happy when he learned that Mr. McLaren—who was to receive Mr. Simpson’s check for a substantial fee—had himself recently paid Judge Segars-Andrews’s husband’s law firm a legal fee “not involving a small amount of money.”¹⁵²

Each member of the Judicial Merit Selection Commission concluded that, having first decided based on all the facts known to her that she needed to step aside, Judge Segars-Andrews should have followed through and maintained her recusal.¹⁵³ Instead, Judge Segars-Andrews reversed course, accepting the positions advanced by Mrs. Simpson’s counsel and their expert, without offering Mr. Simpson and his counsel a full opportunity to respond to the judge’s decision to change her thinking. When she appeared before the Commission, Judge Segars-Andrews conceded that in hindsight she should have held a hearing to announce her decision that she was not going to recuse herself.¹⁵⁴ As it was, Judge Segars-Andrews’s reversal caught Mr. Simpson and his counsel by complete surprise; they had every reason to expect her to adhere to her original recusal position stated in open court because she had announced it in unequivocal terms.¹⁵⁵

Judge Segars-Andrews’s decision to flip-flop on the recusal issue was her undoing. Having proclaimed the existence of a *de facto* appearance of impropriety, she needed to get out of the case absent consent of the parties through remittal of disqualification, which, in light of Mr. Simpson’s opposition, was not an option. Her flip-flopping on the recusal issue was not unprecedented in the annals of judicial ethics, however. In *Perotti v. State*,¹⁵⁶ the Court of Appeals of Alaska disqualified a judge based on appearance of partiality grounds when the judge initially made an offer to recuse and then reversed course.¹⁵⁷ In

150. See Simpson Appellate Record, *supra* note 76, at 126.

151. The Judicial Merit Selection Commission found that “Mrs. Simpson’s attorneys’ legal fees were over \$160,000, while Mr. Simpson’s legal fees were less than \$9,000, more than 20 times Mr. Simpson’s legal fees.” MERIT SELECTION COMM’N REPORT, *supra* note 18, at 18.

152. Simpson Appellate Record, *supra* note 76, at 135.

153. See MERIT SELECTION COMM’N REPORT, *supra* note 18, at 12 (finding of the Commission), 16–17 (comments of Sen. Glenn F. McConnell), 20–21 (comments of Mr. H. Donald Sellers), 27–28 (comments of Professor John P. Freeman).

154. See Transcript of Nov. 4 Public Hearing, Afternoon Session, *supra* note 114, at 84 (“If I had to do it over again, sir, I would have called another hearing and let them know that I had reviewed things and that I had to change—I was wrong.”).

155. The following is an excerpt from an exchange between Judge Segars-Andrews and Mr. Simpson’s lawyer that took place at the April 14, 2006 hearing in family court:

The Court: I’m going to have to recuse myself. You all have to retry the case.

Mr. McKenzie: Thank you, Your Honor. Do you want me to prepare an order, or will the Court prepare one? Or—

The Court: I’ll prepare one.

Mr. McKenzie: Thank you, Your Honor.

Simpson Appellate Record, *supra* note 76, at 135.

156. 806 P.2d 325 (Alaska Ct. App. 1991).

157. See *id.* at 326–27, 330.

the reviewing court's eyes, the judge's own recognition of the problem was "uniquely significant on the issue of appearance of partiality,"¹⁵⁸ and "certainly enhanced the appearance" of impropriety.¹⁵⁹ A judge who stays in a case after personally verbalizing that the facts in question may provide a basis for disqualification raises "doubt[s] as to impartiality and fairness,"¹⁶⁰ which obviously is not a good thing for a judge to do.

Although the Commissioners unanimously agreed that Judge Segars-Andrews's conduct created an appearance of impropriety,¹⁶¹ the Commission split 7–3 in its determination that she lacked the requisite "ethical fitness" to continue on the bench.¹⁶² That finding of unfitness was entirely attributable to her handling of Mr. Simpson's divorce case—and principally due to her failure to recuse—coupled with what one member of the Commission categorized as her refusal "to even acknowledge her mistake in handling the conflict issue in the Simpson case until after the Commission's hearing was concluded and the vote on her qualifications cast."¹⁶³ Judge Segars-Andrews subsequently filed an appeal from the Commission's ruling to the South Carolina Supreme Court, but her request for relief was denied.¹⁶⁴

VI. LESSONS TO BE DRAWN

Judges, lawyers, and members of the public who believe that the Judicial Merit Selection Commission's finding of ethical misconduct on the part of Judge Segars-Andrews runs directly counter to decided authority in her favor need to reconsider that position. They should focus carefully on the fact that the *Simpson* record reflects that the appearance of impropriety allegations raised by Mr. Simpson in his motion to recuse were never directly and explicitly addressed by Judge Segars-Andrews, or by Mrs. Simpson's lawyers or their expert, or by

158. *Id.* at 328.

159. *Id.* at 329.

160. *Sincavage v. Superior Court*, 49 Cal. Rptr. 2d 615, 619 (Cal. Ct. App. 1996); *see also Huffman v. Ark. Judicial Discipline & Disability Comm'n*, 42 S.W.3d 386, 393–94 (Ark. 2001) (finding a judge violated the appearance of impropriety standard by failing to recuse himself where he had previously recused himself twice in cases brought against Wal-Mart due to family ownership of \$700,000 in Wal-Mart stock).

161. The Commission never explicitly voted 10–0 in favor of a finding of ethical impropriety based on conduct involving an appearance of impropriety. Such a determination is implicit in the reports concerning the Commission's action, however. The seven Commission members who voted against Judge Segars-Andrews expressly found ethical impropriety and thus found her ethically unfit to continue as a judge. Professor Freeman's dissenting report, in which two additional Commission members joined, agreed with the majority that Judge Segars-Andrews had mishandled the recusal motion, but concluded nonetheless that Mr. Simpson's grievance did not provide a basis for finding Judge Segars-Andrews unfit to continue on the bench.

162. MERIT SELECTION COMM'N REPORT, *supra* note 18, at 31.

163. *Id.* at 20 (comments of H. Donald Sellers).

164. *Segars-Andrews v. Judicial Merit Selection Comm'n*, 387 S.C. 109, 116, 691 S.E.2d 453, 457 (2010) (per curiam).

the Court of Appeals in affirming on appeal, or even by the Commission on Judicial Conduct, which dismissed Mr. Simpson's grievance without ever conducting a searching investigation of the underlying facts.

On the other hand, Judge Segars-Andrews did implicitly respond to Mr. Simpson's appearance of impropriety contentions. She did so in her candid factual statements when she informed the parties and their counsel about the conflict problem stemming from the very large fee her husband had recently collected from Mrs. Simpson's lawyer. By making statements such as, "I'm going to have to recuse myself,"¹⁶⁵ Judge Segars-Andrews in essence testified in favor of Mr. Simpson's point that a serious appearance of impropriety problem had presented itself. Indeed, when she appeared before the Commission, Judge Segars-Andrews explained that she initially had decided to recuse herself because she believed her service in the case was tainted by an appearance of impropriety.¹⁶⁶ Yet, neither her formal order, nor the South Carolina Court of Appeals, nor the Commission on Judicial Conduct's grievance dismissal letter ever mentioned the phrase "appearance of impropriety" in relation to Judge Segars-Andrews's conduct.

A key lesson to be derived from the Segars-Andrews matter is this—if an ethics charge is leveled at a judge, it needs to be dealt with directly, completely, and convincingly. Waffling, flip-flopping, or avoiding the issue is conduct that only adds fuel to the complainant's position that something is amiss. The Segars-Andrews experience also teaches that, absent a proper remittal of disqualification,¹⁶⁷ a judge should never stay in a case after admitting that grounds exist for disqualification. Remittal is not an option when a judge faces a recusal motion. After all, the recusal motion is being made because the moving party does not trust the judge.

A judge who first concedes that there are grounds for a party's lack of trust and then reverses course cannot help but confirm the dubious party's suspicion that the judge cannot be trusted. As Commission Chairman Senator Glenn F. McConnell stated in his separate comments to the Commission's final report:

[W]e cannot discount what Mr. Simpson reasonably believes, especially when the circumstantial evidence could readily justify that belief. I also believe that any reasonable person in the public in similar circumstances to Mr. Simpson could also believe that justice in this case was not

165. Simpson Appellate Record, *supra* note 76, at 135.

166. See Transcript of Nov. 4 Public Hearing, Afternoon Session, *supra* note 114, at 84.

167. If the procedure for remittal under Canon 3 of the Code of Judicial Conduct is used, it needs to be followed to the letter—the judge must disclose the basis for potential recusal on the record, and the parties must next be given an opportunity, out of the judge's presence, to consider the issue. See S.C. APP. CT. R. 501, Canon 3F. Following that consideration, if the parties agree to allow the judge to continue to sit, the parties' waiver agreement needs to be made a part of the record. See *id.* The commentary to the Canon goes further, suggesting, "As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement." *Id.* at cmt.

administered fairly. This is the test enunciated in the commentary to Canon 2A. This appearance of impropriety leads to lack of faith in the system, and I believe the Commission must endeavor to ensure that the public believes that justice will be administered in an even manner without regard to who appears in the court or who represents them.

....

... Her ruling in this case, no matter how well-reasoned or correct, is under the pall of her ambiguous actions regarding her recusal. Mr. Simpson now reasonably questions both her verdict and his faith in the administration of justice in South Carolina.¹⁶⁸

The Segars-Andrews matter thus sends an unequivocal message that “ambiguous actions” are to be avoided when ethics charges are being leveled. It also makes clear the need for upfront, comprehensive factual disclosure of all relevant facts by judges on the record, with the parties being given a full opportunity to evaluate the judge’s disclosures before having to waive any objection through remittal or ask the judge to step aside.

Moreover, if a recusal decision leads to a complaint before the Judicial Merit Selection Commission against a judge who is undergoing the screening process, the Segars-Andrews record demonstrates the need for very detailed and careful preparation. A judge should never assume that because the decision in question has been reviewed and found unobjectionable by anyone—an ethics expert, a reviewing court, or even the Commission on Judicial Conduct—a safe harbor immunizes the decision from scrutiny. As noted above, all members of the Judicial Merit Selection Commission concluded that there was an appearance of impropriety problem in Judge Segars-Andrews’s handling of Mr. Simpson’s divorce case.¹⁶⁹

To whom can a judge turn when faced with a troublesome recusal motion? One option is to seek an opinion from South Carolina’s Advisory Committee on Standards of Judicial Conduct.¹⁷⁰ Also, nothing precludes a judge faced with an ethical accusation from retaining counsel to provide specialized legal assistance on the issue. A judge has “inherent power . . . to appoint persons unconnected

168. MERIT SELECTION COMM’N REPORT, *supra* note 18, at 18–19. Chairman McConnell’s observation meshed with the explanation of the Commission majority for its determination that Judge Segars-Andrews lacked the requisite ethical fitness to continue on the bench: “The Commission’s investigation revealed evidence that Judge Segar[s]-Andrews’[s] conduct caused an appearance of impropriety that led a litigant not only to question Judge Segars-Andrews’[s] ability to render a fair and impartial decision, but also to lose faith in the integrity of this state’s judicial system.” *Id.* at 5.

169. *See supra* note 161.

170. *See generally* S.C. APP. CT. R. 503 § A (“The purpose of the [Advisory] Committee shall be to render written advisory opinions to inquiring judges concerning the propriety of contemplated judicial and nonjudicial conduct.”).

with the court to aid [the] judge[] in the performance of specific judicial duties, as they may arise in the progress of a cause.”¹⁷¹ Such a specialist can be appointed as a non-testifying consultant to serve as a quasi-law clerk.¹⁷² A judge in need of specialized guidance may also designate a specialist as the court’s expert for the purpose of getting independent advice on a specialized problem, including a potentially thorny ethics-related problem.¹⁷³

If nothing else, resort to and reliance on the advice of a qualified and independent source should go a long way in helping to establish the judge’s good faith and sincere interest in reaching a principled result free from self-interest. Above all, the Segars-Andrews matter teaches that it is not enough merely for a judge to decide a case correctly; the decisionmaking process must be conducted, as Canon 2A of the Code of Judicial Conduct states, “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁷⁴

VII. CONCLUSION

An article about the Judicial Merit Selection Commission’s ruling on Judge Segars-Andrews proposes, by way of a reform measure, that “the Supreme Court reconsider the prejudice standard for review of disqualification decisions.”¹⁷⁵ As the author explained, a test that requires proof of bias or prejudice is really not an ideal standard for testing ethical compliance because “prejudice is almost impossible to prove.”¹⁷⁶ Demanding that litigants challenging judges’ ethics meet an “almost impossible” standard of proof provides protection for judges from ethics-based attacks at the cost of fundamental fairness for litigants. The fact that case law can be read to have imposed an impossibly high proof hurdle for Mr. Simpson did not go unnoticed by the Commission, which is one reason the affirmance of Judge Segars-Andrews’s recusal ruling by the South Carolina Court of Appeals carried little weight. In any event, as we have seen, the prejudice standard in South Carolina for recusal decision appeals is destined to go the way of the dodo bird because of *Caperton*.

The proof standard for an ethics violation is lower than that required for a due process violation. As Justice Kennedy observed in *Caperton*, “Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the

171. *Ex parte Peterson*, 253 U.S. 300, 312 (1920).

172. *Cf. Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988) (upholding the appointment of an economist as a specialized consultant whose function was “in the nature of a law clerk” (internal quotation marks omitted)).

173. *See, e.g., In re Guardianship of J.C.*, 608 A.2d 1312, 1322 (N.J. 1992) (advising that, where necessary, a judge “should not hesitate to call on independent experts”).

174. S.C. APP. CT. R. 501, Canon 2A.

175. Nathan M. Crystal, *The Segars-Andrews Case—Looking to the Future*, S.C. LAW., May 2010, at 8, 8.

176. *Id.*

Constitution.”¹⁷⁷ Further, *Caperton* instructs that proof of actual bias or prejudice need not be adduced in order to establish a constitutional violation on due process grounds.¹⁷⁸ In so holding, *Caperton* performed a great service, making it easier for litigants and reviewing courts to protect against contamination of the judicial process. After *Caperton*, it would be incongruous for appellate courts to require litigants attacking a judge’s failure to recuse on ethical grounds to provide a greater quantum of proof than what they would need to establish a due process violation. Hence, the “actual prejudice” standard featured in the *Simpson v. Simpson* decision is dead and awaiting burial.¹⁷⁹

Thus, *Caperton* will assist the recusal process by permitting a judge deciding a recusal motion to do the right thing and step aside on appearance grounds without conceding that there are grounds for proving actual bias.¹⁸⁰ This is because *Caperton* instructs that conduct sufficient to cause a judge to “feel a debt of gratitude”¹⁸¹ to one side can tip the scale and thereby create an appearance of impropriety. As one judicial ethics commentator has explained, “recusal seems appropriate when the attorney now appearing before the judge helped the judge . . . attain a large monetary recovery.”¹⁸² Was her husband’s receipt of the \$300,000 fee from Mrs. Simpson’s counsel while the case was pending sufficient to provoke a feeling of “a debt of gratitude” by Judge Segars-Andrews in favor of Mrs. Simpson’s lawyer? Evidently Judge Segars-Andrews and her husband both thought there was a serious issue—he brought the payment to her attention, which prompted her initial decision to recuse herself. The Judicial Merit Selection Commission obviously thought so too.

At the center of the judicial role is the requirement that judges be fair to each side and partial to neither. Thus, judges called on to decide recusal motions must above all be sure that they conduct their decisionmaking in accordance with the command of Canon 2A—namely, “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁸³ This means that judges faced with possible grounds for recusal need to confront and resolve the issue

177. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009).

178. *See id.* at 2263.

179. One way to ensure that the actual bias proof requirement is given a proper burial would be for the South Carolina Supreme Court to adopt a rule similar to that adopted by the Michigan Supreme Court post-*Caperton*. The new Michigan rule provides that disqualification is warranted where, among other things,

[t]he judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v. Massey*, or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

MICH. CT. R. 2.003(C)(1)(b) (citation omitted), available at <http://coa.courts.mi.gov/rules/documents/1chapter2civilprocedure.pdf>.

180. Likewise, in future appeals focusing on a failure to recuse, reviewing appellate courts will be freed of the obligation of finding that a lower court judge actually was biased or prejudiced.

181. *Caperton*, 129 S. Ct. at 2262.

182. Abramson, *supra* note 148, at 90.

183. S.C. APP. CT. R. 501, Canon 2A.

directly. This also means that judges need to make full and timely disclosure of all material facts on the record and that parties must be encouraged to review the facts carefully before advising the court of their respective positions. Additionally, this means that in reaching its decision, the court must give careful and objective consideration to each side's position—possibly with the assistance of an opinion from the Advisory Committee on Standards of Judicial Conduct or a court-appointed consultant, should the court have a need for independent specialized assistance. This means that the deciding judge must steer a steady, consistent, and measured course to a well-reasoned outcome.

The United States Supreme Court once observed that litigants are “entitled to a fair trial but not a perfect one, for there are no perfect trials.”¹⁸⁴ Just as there are no perfect trials, there are no perfect judges, either. Being human, all judges are fallible and they will make mistakes. It is a given that judges will sometimes produce incorrect outcomes, so a judge who occasionally errs has little to fear from a fair evaluator. On the other hand, a judge is apt to be much more harshly criticized where the decisionmaking process bears (or appears to bear) a taint of impropriety. Simply put, when it comes to evaluation of a judge's ethical behavior, process can (and often will) matter more than outcome.

The Code of Judicial Conduct defines a good judge as one who avoids the appearance of partiality. There is no more important time for a judge to present with clarity the appearance of complete impartiality than when evaluating and processing a recusal motion targeting his or her ethical behavior. South Carolina judges who are careful to cloak their well-considered decisionmaking with the appearance of *propriety* have nothing to fear from reviewing courts, the Commission on Judicial Conduct, or the Judicial Merit Selection Commission.

184. *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)) (internal quotation marks omitted).

